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REPORT
106–385

FAIR ACCESS TO INDEMNITY AND REIMBURSEMENT ACT

OCTOBER 14, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLING, from the Committee on Education and the Workforce, submitted the following

R E P O R T

TOGETHER WITH MINORITY VIEWS

[To accompany H.R. 1987]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 1987) to allow the recovery of attorneys' fees and costs by certain employers and labor organizations who are prevailing parties in proceedings brought against them by the National Labor Relations Board or by the Occupational Safety and Health Administration, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Access to Indemnity and Reimbursement Act".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress makes the following findings:

(1) Certain small businesses and labor organizations are at a great disadvantage in terms of expertise and resources when facing actions brought by the National Labor Relations Board or by the Occupational Safety and Health Administration.

(2) The attempt to "level the playing field" for small businesses and labor organizations by means of the Equal Access to Justice Act has proven ineffective and has been underutilized by these small entities in their actions before the National Labor Relations Board and before the Occupational Safety and Health Review Commission.

(3) The greater expertise and resources of the National Labor Relations Board and the Occupational Safety and Health Administration as compared with those

of small businesses and labor organizations necessitate a standard that awards fees and costs to certain small entities when they prevail against the National Labor Relations Board or against the Occupational Safety and Health Administration.

(b) PURPOSE.—It is the purpose of this Act—

(1) to ensure that certain small businesses and labor organizations will not be deterred from seeking review of, or defending against, actions brought against them by the National Labor Relations Board or by the Occupational Safety and Health Administration because of the expense involved in securing vindication of their rights;

(2) to reduce the disparity in resources and expertise between certain small businesses and labor organizations and the National Labor Relations Board and the Occupational Safety and Health Administration; and

(3) to make the National Labor Relations Board and the Occupational Safety and Health Administration more accountable for their enforcement actions against certain small businesses and labor organizations by awarding fees and costs to these entities when they prevail against the National Labor Relations Board or in proceedings before the Occupational Safety and Health Review Commission.

SEC. 3. AMENDMENT TO NATIONAL LABOR RELATIONS ACT.

The National Labor Relations Act (29 U.S.C. 151 and following) is amended by adding at the end the following new section:

"AWARDS OF ATTORNEYS' FEES AND COSTS

"SEC. 20. (a) ADMINISTRATIVE PROCEEDINGS.—An employer who, or labor organization that—

"(1) is the prevailing party in an adversary adjudication conducted by the Board under this or any other Act; and

"(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the adversary adjudication was initiated,

shall be awarded fees and other expenses as a prevailing party under section 504 of title 5, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the Board was substantially justified or special circumstances make an award unjust. For purposes of this subsection, the term 'adversary adjudication' has the meaning given that term in section 504(b)(1)(C) of title 5, United States Code.

"(b) COURT PROCEEDINGS.—An employer who, or a labor organization that—

"(1) is the prevailing party in a civil action, including proceedings for judicial review of agency action by the Board, brought by or against the Board, and

"(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the civil action was filed,

shall be awarded fees and other expenses as a prevailing party under section 2412(d) of title 28, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust. Any appeal of a determination of fees pursuant to subsection (a) or this subsection shall be determined without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust.".

SEC. 4. APPLICABILITY OF NLRA AMENDMENT.

(a) AGENCY PROCEEDINGS.—Subsection (a) of section 20 of the National Labor Relations Act, as added by section 3 of this Act, applies to agency proceedings commenced on or after the date of the enactment of this Act.

(b) COURT PROCEEDINGS.—Subsection (b) of section 20 of the National Labor Relations Act, as added by section 3 of this Act, applies to civil actions commenced on or after the date of the enactment of this Act.

SEC. 5. AMENDMENT TO OCCUPATIONAL SAFETY AND HEALTH ACT.

The Occupational Safety and Health Act (29 U.S.C. 651 and following) is amended by inserting after section 12 at the end the following new section:

"AWARDS OF ATTORNEYS' FEES AND COSTS

"SEC. 12A. (a) ADMINISTRATIVE PROCEEDINGS.—An employer who—

"(1) is the prevailing party in an adversary adjudication before the Occupational Safety and Health Review Commission under this or any other Act, and

"(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the adversary adjudication was initiated,

shall be awarded from the Secretary of Labor fees and other expenses as a prevailing party under section 504 of title 5, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the Secretary of Labor was substantially justified or special circumstances make an award unjust. For purposes of this subsection, the term 'adversary adjudication' has the meaning given that term in section 504(b)(1)(C) of title 5, United States Code.

"(b) COURT PROCEEDINGS.—An employer who—

"(1) is the prevailing party in a civil action, including proceedings for judicial review of an action by the Occupational Safety and Health Review Commission, brought by or against the Secretary or the Commission, and

"(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the civil action was filed,

shall be awarded from the Secretary of Labor fees and other expenses as a prevailing party under section 2412(d) of title 28, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust. Any appeal of a determination of fees pursuant to subsection (a) or this subsection shall be determined without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust.".

SEC. 6. APPLICABILITY OF OSHA AMENDMENT.

(a) AGENCY PROCEEDINGS.—Subsection (a) of section 12A of the Occupational Safety and Health Act, as added by section 5 of this Act, applies to agency proceedings commenced on or after the date of the enactment of this Act.

(b) COURT PROCEEDINGS.—Subsection (b) of section 12A of the Occupational Safety and Health Act, as added by section 5 of this Act, applies to civil actions commenced on or after the date of the enactment of this Act.

PURPOSE

The purpose of H.R. 1987, the Fair Access to Indemnity and Reimbursement (FAIR) Act, is to assist small businesses and labor organizations in defending themselves against government bureaucracy. By providing for the reimbursement of attorney's fees and expenses to certain prevailing small employers, the legislation is intended to help prevent spurious lawsuits and ensure that employers of modest means have an incentive to adequately represent themselves against the National Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA).

COMMITTEE ACTION

H.R. 1987, the FAIR Act, was introduced by Representative Bill Goodling on May 27, 1999. H.R. 1987 was marked up in Full Committee on July 29, 1999, and ordered favorably reported, as amended, by roll call vote (yeas 24, nays 19, not voting 6).

The FAIR Act is an expanded version of Title IV of last Congress' H.R. 3246, the Fairness for Small Business and Employees Act of 1998, introduced by Representative Bill Goodling on February 24, 1998. H.R. 3246 was marked-up in the Employer-Employee Relations Subcommittee on February 26, 1998, marked up in Full Committee on March 11, 1998, and ordered reported favorably by roll call vote. H.R. 3246 passed the House last Congress on March 26, 1998 by a 202 to 200 vote. While Title IV of H.R. 3246 provided for reimbursement of fees for parties prevailing against the NLRB, H.R. 1987 applies to parties prevailing in proceedings before both the Board and the OSHA.

H.R. 1987 currently has 28 cosponsors. The bill was addressed by the Employer-Employee Relations Subcommittee during a field hearing on May 10, 1999 in Indianapolis, Indiana, held jointly with

the Senate Labor Committee's Subcommittee on Employment, Safety and Training. Testimony was heard from witnesses Mr. Harry C. Alford, president/CEO, National Black Chamber of Commerce, Inc., Washington, DC; Mr. Carl Shaffer, Indiana state organizer, International Brotherhood of Electrical Workers, Walkerton, Indiana; Mr. Charlie Farrell, president, C.R. Electric Company, Indianapolis, Indiana; Mr. Neil Gath, attorney, Fillenwarth, Dennerline, Groth & Towe, Indianapolis, Indiana; Mr. Randy Truckenbrodt, president, Randall Industries, Inc., Elmhurst, Illinois; and Mr. Larry Gordon, owner, G & N Fabrications, Franklin, Indiana.

The Committee also addressed the concept of reimbursement for prevailing parties last Congress at the Employer-Employee Relations Subcommittee's February 5, 1998, hearing. Testimony was received from witnesses Mr. Jay Krupin, partner, Krupin, Greenbaum & O'Brien, Washington, DC; Mr. Peter C. Rousos, director of corporate human resources, Gaylord Entertainment Company, Nashville, Tennessee, testifying on behalf of the U.S. Chamber of Commerce; and Mr. Richard Griffin, general counsel, International Union of Operating Engineers, Washington, DC. The issue was also brought into the discussions of labor policies during two earlier EER Subcommittee hearings: Hearing on H.R. 758, the Truth in Employment Act of 1996, on October 9, 1997, and Hearing on Review of the National Labor Relations Board, on September 23, 1997.

SUMMARY

H.R. 1987 recognizes that Congress should be doing everything in its power to create an environment where small employers can be successful in what they do best—creating jobs and being the engine that drives America's economic growth. The legislation also recognizes that federal agencies are applying the law in ways that not only harm small employers—businesses and unions—but also does a great disservice to hardworking men and women who work for those employers.

The FAIR Act would help prevent the NLRB and the OSHA from strong-arming small businesses. The bill would ensure that small businesses have the incentive to adequately represent themselves against both agencies by leveling the playing field. The legislation amends the National Labor Relations Act (NLRA) and the Occupational Safety and Health Act (OSH Act) to provide that a small employer that prevails in an action against the NLRB or the OSHA will automatically be allowed to recoup the attorney's fees and expenses it paid defending against the meritless claim.

The bill would apply to an employer (including a labor organization) who has not more than 100 employees and a net worth of not more than $7,000,000. As explained below, the employee-eligibility limit represents a mere 20 percent of the current 500 employee/$7 million net worth eligibility limits for employers under the Equal Access to Justice Act (EAJA), a bill passed with strong bipartisan support in 1980 to provide small businesses with an effective means to fight against abusive and unwarranted intrusions by federal agencies. The EAJA—the vehicle by which employers prevailing against the Board or the OSHA must currently try to re-

cover attorney's fees and costs—has proven ineffective and is not often utilized against either agency.

The rationale for the FAIR Act is that government agencies the size of the NLRB and the OSHA—well-staffed, with numerous lawyers—should more carefully evaluate the merits of a case before bringing it against a small business, which is ill-equipped to defend itself against an opponent with such superior expertise and resources. Furthermore, small businesses have been victimized by relatively frivolous lawsuits by these agencies, but have been unable to fight cases to their conclusions based on the merits due to lack of resources, and have had to settle the case. H.R. 1987 would provide some protection for an employer who feels strongly that its case merits full consideration. If the Board or the OSHA brings a losing case against a "little guy," they should pay the attorney's fees and expenses the company had to spend to defend itself.

COMMITTEE VIEWS

Small businesses and labor organizations facing an action brought against them by the National Labor Relations Board or the Occupational Safety and Health Administration are at a huge disadvantage. Both agencies have armies of lawyers well-versed in labor law, while the small company—or labor organization—often does not have the resources to adequately defend itself. Small entities often are unable to fight a questionable case to its conclusion based on the merits because of a lack of resources, and end up having to settle the case with the Board or the OSHA because it is the only viable option.

In fiscal year 1998, for example, the Board received and investigated more than 30,000 unfair labor practice charges, with 3,421 charges resulting in a complaint being issued by the Board's general counsel. Of these complaints, 2,814 were settled at some point post-complaint.[1] At the OSHA, of nearly 77,000 total violations cited in fiscal year 1998, some 2,061 inspections resulting in citations were contested—1,081 contested cases involving employers with 100 or fewer employees. As OSHA Assistant Secretary Charles Jeffress pointed out, most cases are settled or withdrawn before the Occupational Safety and Health Review Commission (OSHRC) issues a final decision.[2]

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[1] Figures provided by the NLRB to the Committee in chart form—a summary of figures available in the NLRB's annual reports.

[2] OSHA statistics provided in April 16, 1999 letter from Jeffress to Sen. Michael B. Enzi, chairman, Subcommittee on Employment, Safety and Training of the Senate Committee on Health, Education, Labor and Pensions; See also 61 Am. Jur. 2d Plant and Job Safety s 95, fn. 44 (1981) (citing OSHA study showing about 60 percent of contested citations settled before reaching the OSHRC or the courts).

The OSHRC is an independent agency created by the Occupational Safety and Health Act of 1970, 29 U.S.C. Section 651 et seq. The sole function of the Commission is to carry out adjudicative functions under the OSH Act. The Commission is composed of three members, each of whom is appointed by the president by and with the advice and consent of the Senate. Cases coming before the Commission are first heard by an administrative law judge. The decision of the ALJ can be reviewed by the full Commission at the discretion of any single member. A decision of the full Commission may be appealed to an appropriate United States Court of Appeals either by the Secretary of Labor or by any person adversely affected or aggrieved.

As labor attorney Jay P. Krupin aptly summarized the situation at the NLRB when testifying before the subcommittee: [3]

> When unions file unfair labor practice charges, the Board in reality becomes the advocate for the union. The union benefits from the Board's resources and staff, and generally does not have to expend additional significant funds to process their claims. Unfortunately, smaller employers have no such aid. Moreover, unions know this. Therefore, unions file goading charges, exaggerating claims to such a degree that the Board must investigate and cause employers to defend themselves. Unions file multiple charges, hoping to convince the Board that some impropriety must have occurred if so many claims are alleged. Unions file charges specifically and artfully based upon credibility determinations, requiring the Board to issue a complaint and seek a hearing because the credibility of witnesses becomes crucial in the case. *As a result, even if an employer is correct on the merits, the actions of the Board on behalf of unions as the charging party virtually beat an employer into submission. Such actions back small employers against the wall into settling matters where no wrongdoing occurred. Some employers stand on the verge of bankruptcy to defend themselves. Recently, the NLRB has become increasingly hostile to small employers with the stress of limited resources and internal time limits which may not be practical. The small employer is trapped.* This is not the purpose of the National Labor Relations Act. It is not the mandate of the National Labor Relations Board. Indeed, the Board must look more closely at Labor's claims and must take greater responsibility before issuing complaints and holding hearings. To ensure that such abuses do not continue, we fully support [the attorney's fee legislation].

In addition to unfair labor practices at the NLRB, other administrative actions, such as those at the OSHA, require an employer response. As pointed out by labor counsel Vincent T. Norwillo: [4]

> These responses mandate the reallocation of time, money and other productive resources from marketing, advertising, sales, market research, employee training and other legitimate business pursuits. Invariably, employer attorney's fees comprise the largest component of this defense cost. These daunting figures compel employers to settle contested charges on unfavorable terms regardless of culpability. In addition, these financial pressures impose an independent pecuniary penalty on employers who resist the temptation to settle and prevail on the charges, thus

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[3] Hearing on Legislation to Provide Fairness for Small Businesses and Employees, before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee, 105th Cong., 2nd Sess., pp. 65–66. (February 5, 1998) (Serial No. 105–72) (Emphasis added).

[4] May 10, 1999, written testimony of Vincent T. Norwillo, labor counsel, Tradesmen International, Inc., before a joint field hearing of the House Subcommittee on Employer-Employee Relations and the Senate Subcommittee on Employment, Safety and Training, Indianapolis, Indiana, 106th Cong., 1st Sess., p. 5.

chilling the resolve of employers to defend against a repeat barrage in the future.

Under current law, small businesses and unions who have prevailed against the NLRB or the OSHA may use the Equal Access to Justice Act (EAJA) to attempt to recover the attorney's fees and expenses they have incurred in defending the action they have won.[5] The EAJA—passed in 1980 to provide small employers an effective means to fight unwarranted intrusions by federal agencies—is available to employers having not more than 500 employees and a net worth of not more than $7 million. Unfortunately, the EAJA is not often utilized against the NLRB or the OSHA and has proven ineffective.

Under the EAJA, a prevailing party[6] will not get its fees if the losing agency can show its position was "substantially justified." Agencies have easily met the "substantially justified" burden of proof because courts have interpreted the burden to actually be one of "reasonable basis in law and fact."[7] Despite Congress' effort in 1985 to clarify (in committee report language) that "substantially justified" places a burden on the general counsel greater than "reasonable basis,"[8] current law follows the 1988 Supreme Court ruling that the burden is in fact the lower "reasonable basis" standard.

Given the low burden before the NLRB and the OSHA, and since an EAJA claim itself can be as costly as the underlying action, not many EAJA applications are being filed with either agency. A GAO report prepared for the Committee and released in February 1998[9] showed that the number of EAJA applications received by the NLRB reached a high of 51 in 1984 and a low of six in 1994.[10] As Table 1 and Table 2 below show, the number of EAJA applications

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[5] 5 U.S.C. §504 et seq.; 28 U.S.C. §2412 et seq. The EAJA provides that an agency, in any adversary adjudication, or a court, in any civil action (except tort actions and tax cases, but including judicial review of agency actions), shall award "to a prevailing party other than the United States," fees and other litigation expenses unless the agency or court can demonstrate that its position was "substantially justified" or that "special circumstances make an award unjust." 5 U.S.C. §504(a)(1); 28 U.S.C. §2412(d). Viewed by Congress as a small business relief measure and as a regulatory reform bill, the EAJA was passed in 1980 on a three-year trial basis, expired in 1984, and was reenacted on a permanent basis is 1985, retroactive to 1984. Congress intended that litigants of modest resources would be encouraged to defend themselves against unjustified government action.

[6] Under current law, in addition to falling within the EAJA's net worth and employee limitations, an applicant must "prevail" against the Board in order to be eligible to recover fees and expenses. A party must be "a respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of the proceeding." 29 CFR Section 102.143(b). The Board must actually issue a complaint in order to create the possibility of any potential EAJA claim. 29 CFR Section 102.143(a) ("the term adversary adjudication as use in this subpart, means unfair labor practice proceedings pending before the Board on complaint").

With respect to the OSHA, the EAJA applies to adversary adjudication before the Occupational Safety and Health Review Commission (OSHRC). 29 CFR Section 2204.103. Under the OSHRC's EAJA regulations, adversary adjudication includes contests of citations, notifications, penalties, or abatement periods by an employer; contests of abatement periods by an affected employee or authorized employee representative; and petitions for modifications of the abatement periods by an employer. 29 CFR Section 2204.104. As with NLRB proceedings, a prevailing applicant before the OSHRC may receive an award for fees and expenses in connection with a proceeding, or in "a discrete substantive portion of the proceedings." 29 CFR Section 2204.106(a).

[7] *Pierce* v. *Underwood,* 487 U.S. 552 (1988). In *Pierce,* the Supreme Court held that a "more than mere reasonableness" test would be "out of accord with prior usage" and "unadministerable." "Between the test of reasonableness," the Court wrote, "and a test such as 'clearly and convincingly justified' * * * there is simply no accepted stopping-place, no ledge that can hold the anchor for steady and consistent judicial behavior." 487 U.S. at 568.

[8] H. Rept. 99–120, 99th Cong., 1st Sess. 9–10 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 138.

[9] "Equal Access to Justice Act: Its Use in Selected Agencies," B–278335, GAO/HEHS–98–58R (January 14, 1998).

[10] Id., at pp. 19–20.

for both Board and Circuit Court of Appeals decisions, and applications granted, has fallen significantly:[11]

TABLE 1.—BOARD DECISIONS ON EAJA APPLICATIONS AT NLRB, FISCAL YEARS 1982–98

Fiscal year	Number of applications		Amount of fees and expenses awarded
	Decided	Granted	
1982	17	0	0
1983	37	0	[a] $23,941
1984	35	3	39,226
1985	26	2	69,153
1986	31	6	126,620
1987	7	1	126,766
1988	8	5	106,042
1989	24	3	40,534
1990	12	1	14,415
1991	5	0	[a] 28,400
1992	9	3	60,822
1993	4	0	0
1994	2	2	31,900
1995	7	3	36,553
1996	8	1	11,319
1997	2	2	14,345
1998	2	0	0
Total	236	32	730,036

[a] Although NLRB records show these as fees and expenses awarded, NLRB officials explained that they were probably not amounts awarded by NLRB but (1) may have represented settlements or cases decided by ALJs and not appealed to NLRB but became orders of NLRB or (2) were applications that were granted in one fiscal year but paid in another.

TABLE 2.—CIRCUIT COURT OF APPEALS DECISIONS OF NLRB EAJA APPLICATIONS, FISCAL YEARS 1982–98

Fiscal year	Number of applications		Amount of fees and expenses awarded
	Decided	Granted	
1982	8	0	0
1983	8	1	$16,490
1984	16	0	0
1985	12	1	13,264
1986	9	3	43,652
1987	7	1	25,000
1988	5	2	70,952
1989	6	2	43,957
1990	6	1	150,000
1991	3	2	32,532
1992	5	4	107,428
1993	4	3	100,423
1994	4	2	35,500
1995	0	0	0
1996	8	0	0
1997	6	3	57,585
1998	7	6	167,385
Total	118	30	864,168

Having decided 146 EAJA applications—and granting 11—during fiscal years 1982 to 1986, the Board decided only 25—granting 8—during fiscal years 1993 to 1998.[12] NLRB EAJA applications have

[11] Ibid.

[12] Id., at p. 19. Statistics for EAJA applications and awards for fiscal year 1998 were provided to the Committee on July 29, 1999.

similarly fallen off with respect to circuit court of appeals decisions of NLRB EAJA applications. In fiscal years 1982 to 1986 there were 5 awards out of 53 decisions, while from fiscal years 1993 to 1998, there were 14 awards granted out of only 29 decisions.[13]

As Table 3 shows, in the 19 fiscal years 1981 to 1999, the OSHRC received only 82 EAJA applications. Out of 75 total decisions, a mere 30 awards have been made in these 19 years—approximately 1.5 awards a year—for a total of slightly more than $200,000 with the average award being $10,729.[14]

TABLE 3.—EAJA APPLICATIONS AT OSHRC, FISCAL YEARS 1981–99

Fiscal year	Number of applications [a]			Amount of fees and expenses awarded
	File	Decided	Granted	
1981	0	0	0	0
1982	2	2	0	0
1983	4	4	0	0
1984	2	2	1	$2,969
1985	6	6	0	0
1986	4	4	1	8,392
1987	6	6	3	14,533
1988	4	4	3	18,831
1989	5	5	3	5,461
1990	4	4	2	12,423
1991	8	8	5	40,678
1992	1	1	1	10,281
1993	2	2	1	14,158
1994	5	5	0	0
1995	5	5	3	5,583
1996	2	2	0	0
1997	6	6	2	28,876
1998	4	4	2	5,000
1999	12	[b] 5	3	36,671
Total	82	75	30	203,856

[a] Information provided to the Committee by the Office of the General Counsel, OSHRC, on June 17, 1999. The Commission indicated that it is computerized case tracking system only goes back two to three years. Lexis searches were used to supplement that information. Furthermore, the General Counsel noted there probably exist EAJA cases that were disposed of by administrative law judges' orders that were never included in the Lexis database, and that, therefore, the numbers were probably low, but that there are probably not ''many'' more.

[b] Seven EAJA Applications pending, as of June 17, 1999.

It is the Committee's view that despite the EAJA, many small employers are intimidated by the labyrinth of rules, procedures, and politics involved in defending themselves against the NLRB or the OSHA, and believe it is easier—and far less expensive—to give up the fight. While these agencies understandably would argue that the lack of successful EAJA claims is due to them carefully moving forward only when they are "substantially justified" in bringing their actions, small employers and unions prevailing against either agency, however, recognize the long odds of winning, and high expense of undertaking, additional litigation to attempt to secure an award under the EAJA.[15]

[13] Id., at p. 20, supplemented by the NLRB statistics provided July 29, 1999.

[14] With respect to OSHA cases granted EAJA awards through the courts, the Government Accounting Office provided information to the Committee on March 19, 1999, indicating that from years 1982 to 1997, only two applicants received awards—one award for $7,194 in fiscal year 1984 and another for $15,065 in fiscal year 1986.

[15] See, Lewis, Robert, "NLRB Policy Under the Equal Access to Justice Act," Nat. L.J., April 9, 1984 ("[EAJA] applications are opposed as a matter of course on a variety of technical grounds, quite apart from the main issue of substantial justification or special circumstances.

Continued

As pointed out by the U.S. Chamber of Commerce, "A prevailing small business must file a petition—another costly legal action—for reimbursement of its legal expenses under EAJA and then face the prospect that the Board will usually prevail in its claim of substantial justification. Accordingly, most prevailing small businesses do not even file for EAJA reimbursement. (An average of only 10 applications were received by the Board each year during the period 1987 to 1996—a telling statistic)." [16] As indicated in Table 3, the OSHRC receives, on average, only 4 EAJA applications a year.

The EAJA has proven particularly ineffective in providing the intended protection to small entities facing unjustified government action under the NLRA and the OSH Act. Since it is clear the EAJA is underutilized at best, and at worst simply not working, H.R. 1987 imposes a flat rule: If you are a small employer or small labor organization, and you prevail against either agency, then you will get your attorney's fees and expenses from the agency.[17] The FAIR Act would greatly assist small companies like Bay Electric Company, of Cape Elizabeth, Maine, a family-owned electrical contracting company employing 17 people. Founder Don O. Mailman, in urging the subcommittee to move forward with the legislation, described how his company has spent more than $100,000 to defend itself against 11 charges that were ultimately dismissed, and that he personally knows of several small contractors that have pled guilty to charges "rather than face what we went through to prove their innocence." [18]

Filing administrative actions solely to force small employers to hire attorneys and defend themselves, in the words, of Larry Gordon, owner of three-employee G & N Fabrications in Franklin, Indiana, "is not right. It hurts all American employers and employees and their families. It will ultimately drive small operations like mine out of business." [19]

H.R. 1987 adds language to the NLRA and the OSH Act stating that an employer or labor organization who has not more than 100

As a result, the respondent who wins the underlying unfair labor practice case may find that the expense involved in litigating his fee application exceeds the cost of the initial litigation, with no assurance of success").

[16] Hearing on Legislation to Provide Fairness for Small Businesses and Employees, before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee, written testimony of Peter C. Rousos, on behalf of the U.S. Chamber of Commerce, 105th Cong., 2nd Sess., p. 105 (February 5, 1998) (Serial No. 105–72).

[17] For qualifying prevailing employers, i.e., up to 100 employees and a net worth of not more than $7 million, it is the Committee's intent that the award shall be paid by the NLRB or the OSHA out of their appropriated funds. The attorney's fee cap under the EAJA was raised from $75 per hour to $125 per hour by Public Law 104–121, Sections 231–233, signed into law March 29, 1996. The Committee-passed version of H.R. 1987—Chairman Goodling's Amendment in the Nature of a Substitute to H.R. 1987—was offered specifically to make clear with respect to OSHA cases that fees and expenses are to be awarded "from the Secretary of Labor" and not from the OSHRC. See Sec. 5, Amendment in the Nature of a Substitute to H.R. 1987. See also, *In Re Perry,* 882 F.2d 534, 545 (1st Cir. 1989) (Court found "no clear indication of congressional intent to extend EAJA liability to purely adjudicative entities * * * OSHRC is such a creature: a purely adjudicative board").

[18] Hearing on H.R. 758, the Truth in Employment Act of 1996, before the Subcommittee on Employer-Employee Relations, 105th Cong., 1st Sess., at 99 (October 9, 1997) (Serial No. 105–52); See also, May 10, 1999 written testimony of Randall R. Truckenbrodt, president, Randall Industries, before joint field hearing of the House Subcommittee on Employer-Employee Relations and the Senate Subcommittee on Employment, Safety and Training, Indianapolis, Indiana, 106th Cong., 1st Sess., p. 4 ($80,000 spent by employer on attorney's fees to prevail on 35 of 36 unfair labor practice charges. "That amount could have been triple had [Truckenbrodt] not represented [himself] through most of those charges").

[19] May 10, 1999 written testimony of Larry Gordon, before joint field hearing of the House Subcommittee on Employer-Employee Relations and the Senate Subcommittee on Employment, Safety and Training, Indianapolis, Indiana, 106th Cong., 1st Sess., p. 3.

employees and a net worth of not more than $7 million and is a "prevailing party" against the Board or the OSHA in administrative proceedings "shall be" awarded fees as a prevailing party under the EAJA "without regard to whether the position of [the Board or the Secretary of Labor] was substantially justified or special circumstances make an award unjust." It is essentially a "loser pays" rule applying to both agencies in their actions against small employers or labor organizations.[20]

The FAIR Act awards fees and expenses "in accordance with the provisions" of the EAJA and would thus require a party to file a fee application pursuant to the Board's or the OSHRC's existing EAJA regulations, but the prevailing party would not be precluded from receiving an award by either agency showing it was "substantially justified" in bringing the case or that "special circumstances make an award unjust." If the agency loses, it pays the winner's fees and expenses.

H.R. 1987 applies the same rule regarding the awarding of fees and expenses to a small business or labor organization engaged in a civil court action with the NLRB or the OSHA. This covers situations in which the party wins a case against either agency in civil court, including a proceeding for judicial review of agency action. Section 504(c)(2) of the EAJA allows a party to appeal a fee determination within 30 days to a United States court having jurisdiction. H.R. 1987 makes clear that fees and expenses incurred appealing an actual fee determination under the FAIR Act would also be awarded to a prevailing party without regard to the "substantial justification" burden of proof.

This legislation levels the playing field for small employers against the Board and the OSHA because it will cause both agencies to more carefully evaluate the merits of a case before bringing it forward against a small business or labor organization. It also offers the small entity the incentive to fight a meritless case brought against it and see the case through to full consideration. H.R. 1987 applies to employers—businesses and unions—which have not more than 100 employees and a net worth of not more than $7 million. The employee-eligibility limit is a mere 20 percent of the current 500 employee limit for employers under the EAJA. The FAIR Act adopts the regulations and fee application procedures promulgated by the NLRB and the OSHRC pursuant to the EAJA, except that either agency shall award fees and expenses to qualified applicants without regard to whether the Board or the Secretary of Labor was substantially justified or special circumstances make an award unjust.[21]

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[20] Contrary to assertions of some during Committee hearings on this legislation that the "loser pays" concept would be a novel concept since it flies in the face of our judicial system's "American Rule," which holds that each side pays its own legal expenses, many "loser pays" concepts are in present law—Title VII, the Age Discrimination in Employment Act, and the Equal Pay Act, for example, all provide for attorney's fees to prevailing parties. As noted by the GAO, "The Congressional Research Service identified about 180 fee-shifting statutes other than EAJA as of December 1996." GAO/HEHS–98–58R, supra note 9 at p. 25. Furthermore, the Black's Law Dictionary definition of the "American Rule" states that "attorney fees are not awardable to the winning party *unless statutorily or contractually authorized*" (Emphasis added.)

[21] The Board's and the OSHRC's EAJA regulations, 29 CFR Part 102.143–102.155; 29 CFR Part 2204.101–2204.311, define "employees" as "all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included on a proportional basis." 29 CFR Part 102.143(f); 29 CFR Part 2204.105(e).

Continued

As stated above, an employer or labor organization with a net worth of more than $7 million is not eligible for an EAJA award. Under H.R. 1987, an employer, or labor organization, in addition to the eligibility requirement of having no more than 100 employees, is also subject at the same time to a net worth limit of $7 million.

Neither the EAJA nor either agency's EAJA regulations define the term "net worth," and the EAJA's legislative history provides very little as to congressional intent. Congressional committee reports simply define "net worth" as total assets less total liabilities.[22] Under the NLRB's and the OSHRC's EAJA regulations, the applicant must include with its application a statement attesting to its net worth and written verification under oath or under penalty or perjury that the information provided in the application is true.[23] In addition, the applicant must provide "a detailed exhibit" showing the net worth of the applicant "in any form convenient to the applicant that provides full disclosure of * * * assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards of this part."[24] Thus, under current law, the applicant must make the assertion of net worth in its fee application and it is up to the agency, or administrative law judge, to whom the application is submitted, to object.

The only guidance provided by the EAJA legislative history regarding the proper manner in which to determine net worth concerns valuation of assets: "[I]n determining the value of assets, the cost of acquisition rather than fair market value should be used."[25] Some courts, however, have differed by allowing accumulated depreciation to be deducted in calculating net worth, and it is the Committee's intention that for purposes of calculating net worth,

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See Also Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 CFR Section 315.104(e). By coupling net worth with an employee-number eligibility standard, Congress viewed the size of an employer's workforce as a rough measure of an entity's available resources, but did not offer particular distinctions among employers based on status of employees or total hours worked.

With respect to part-time employees, it is the Committee's intent that the employee eligibility standard be a basic pro-rata determination along the lines of the federal government's "full-time-equivalent" (FTE) classification. For example, if the payroll on the date of the complaint has 10 full-time and 10 part-time employees, then you have 15 employees for purposes of the FAIR Act. See Sisk, Gregory C., The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One), 55 La. L. Rev., 217, 305 (Nov. 1994) ("The full-time equivalent approach best conforms with the purpose of * * * excluding large employers from eligibility based on the likely assumption that an entity able to maintain a large payroll has sufficient resources to withstand unreasonable government conduct"). Under the FAIR Act, it still would be the prevailing party's burden to assert the number of employees of the applicant. 29 CFR Part 102.147(a); 29 CFR Part 2204.201(a). Similarly, as the NLRB's regulations state, the determination of number of employees "shall be determined as of the date of the complaint in an unfair labor practice proceeding or the date of the notice of hearing in a backpay proceeding." 29 CFR Part 102.143(d) (The above method of calculating part-time employees for purposes of H.R. 1987 is intended to put to rest what a NLRB general counsel memorandum issued soon after the EAJA was enacted stated was still undetermined: "[T]here is a question of how to count part-time workers on a proportional basis. Does one compute the number of hours worked by a part-time employee on the date the complaint issued, during the week in which complaint issued, during the payroll period in which complaint issued, or during the year[?]" Gen. Couns. Mem. 83–11 (April 7, 1983), The Equal Access to Justice Act—The First Year, reprinted in 1983 LAB. REL. Y.B. (BNA) 222).

As the OSHRC's EAJA regulations state, the number of employees "shall be determined as of the date the notice of contest was filed or, in the case of a petition for modification of abatement period, the date the petition was received by the Commission." 29 CFR Part 2204.105(c).

[22] H. Rept. 96–1418, p. 15; S. Rept. 96–253, p. 17.

[23] 29 CFR Part 102.147(b) and 102.147(e); 29 CFR Part 2204.201(b) and 2204.201(e).

[24] 29 CFR Part 102.147(f); 29 CFR Part 2204.202(a).

[25] H. Rept. 96–1418, p. 15.

the adoption of generally accepted accounting practices, as illustrated by the reasoning of these courts, should be followed.[26]

With regard to the FAIR Act specifically discounting consideration of "special circumstances" along with "substantial justification," it was alleged by one witness at the February 5, 1998, subcommittee hearing that the legislation "would reward those small businesses (and unions) who play cat-and-mouse" with the [agency] by frustrating the investigation with such tactics as, for example, "refusing to allow witnesses to be interviewed, withholding documents and substituting lawyers' submissions for hard evidence."[27] However, the Committee's intent in explicitly discounting "special circumstances" as a consideration in denying a fee award to a prevailing party is not to allow entities with "unclean hands" to reap an undeserved award, rather, the intent is to prevent either agency from advancing "novel" theories which they could argue justifies denying a small business or union from receiving a fee award,[28] and to make inapplicable to entities qualifying under H.R. 1987 the line of EAJA cases allowing an agency to deny awards based on the agency pushing a novel theory of law. It is the Committee's view that these two agencies should not be using small entities of limited resources as guinea pigs to advance new legal theories. Indeed, if either agency wishes to advance some novel theory of law, to "push the envelope," then let they at least do so against those who are larger than 100 employees and have a net worth of more than $7 million.

As the National Grocers Association pointed out, allowing small entities to recoup their expenses when they prevail "is particularly relevant and timely today, as more and more small businesses are being forced to defend against 'test cases' and novel theories that seek to change * * * precedent."[29]

For circumstances in which the business or union has acted with "unclean hands," i.e., has been uncooperative or unreasonably delayed the agency's investigation, the Committee intends that the Board's and the OSHRC's existing EAJA regulations would cover

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[26] See, *Continental Web Press* v. *NLRB,* 767 F.2d 321 (7th Cir. 1985) (holding depreciation properly subtracted when computing "net worth" of company seeking attorney's fees under the EAJA, since legislative history [regarding acquisition cost] "means only that the net worth figure must be derived from company's books rather than from appraisal * * * there is no indication that Congress meant by 'cost of acquisition' undepreciated cost of acquisition" and subtracting accumulated depreciation from cost of acquisition is generally accepted accounting practice); See also *Am. Pac. Pipe Co., Inc.* v. *NLRB,* 788 F.2d 586 (9th Cir. 1986) (pointing to "brief sketch of legislative history" and holding that "Congress would not have wanted us to create a whole new set of accounting principles just for use in cases under the [EAJA]").

[27] Hearing on Legislation to Provide Fairness for Small Businesses and Employees, written testimony of Richard Griffin, general counsel, International Union of Operating Engineers, before the Employer-Employee Relations Subcommittee of the House Committee on Education and the Workforce, 105th Cong., 2nd Sess., p. 116 (February 5, 1998) (Serial No. 105–72).

[28] See, *Teamsters Local 741,* 321 NLRB No. 125 (1996) ("the general counsel may carry its burden of proving that its position was substantially justified by showing its position advanced a novel but credible extension or interpretation of the law"); *Lion Uniform,* 285 NLRB 249 (1987) (recognizing that "the special circumstances defense available to the agencies is a 'safety valve' designed to protect the government from EAJA award 'where unusual circumstances dictate that the government is advancing in good faith a credible, though novel, rule of law,'" citing, H. Rept. 96–1418 at 14 (1980); *Tri-State Steel Construction Co.* v. *Herman,* 164 F.3d 973, 979 (6th Cir. 1999)(OSHA EAJA case wherein court rejected notion that asset aggregation constitutes "special circumstances;" rather, "We have, as the Secretary acknowledges, rejected this approach * * * and held that 'special circumstances' implicates substantive issues such as close or novel questions of law").

[29] Hearing on Review of the National Labor Relations Board, before the Subcommittee on Employer-Employee Relations, 105th Cong. 1st Sess., at 219 (September 23, 1997) (Serial No. 105–64).

situations involving such equities: "An award [will/shall] be reduced or denied if the applicant has unduly or unreasonably protracted the [adversary adjudication/proceeding]."[30]

The FAIR Act says to the NLRB and to the OSHA that if they bring a case against a little guy they had better make sure the case is a winner, because if they lose, if they put the small business or union through the time, expense and hardship of an action only to have the small entity come out a winner in the end, then the agency itself will have to reimburse the employer for its attorney's fees and expenses. As Sen. Ted Kennedy, D–MA, stated during floor debate on the EAJA, which the Committee views as directly germane to the FAIR Act and to the NLRB and the OSHA, "We can no longer tolerate a legal system under which unreasonable government action affecting small businesses [and] other organizations * * * goes unchallenged because the victims are deterred by the legal expense involved."[31] Also, as Sen. Wendell Ford, D–KY stated, "If the agencies choose their cases carefully they will be completely unaffected by this legislation."[32] While these two Senators supported the EAJA, which now applies to business and labor organizations having up to 500 employees and a net worth of no more than $7 million, the Committee emphasizes that H.R. 1987 seeks protection for the very small—those with no more than 100 employees and a net worth of no more than $7 million.

CONCLUSION

The FAIR Act ensures that small businesses and small unions will have the incentive to fight meritless cases that the Board or the OSHA brings against them. If either agency decides to bring its vast resources and expertise to bear upon an entity with meager resources, then the agency should pay the prevailing party's attorney's fees and expense if the agency loses the case. Current law and practice under the EAJA has proven ineffective in leveling the playing field as Congress intended. The FAIR Act would return this needed balance.

SECTION-BY-SECTION ANALYSIS

Section 1

Contains the Short Title, "Fair Access to Indemnity and Reimbursement Act."

Section 2

Establishes the findings of the Committee related to the disadvantage small businesses and labor organizations are at in terms of expertise and resources when facing actions brought against them by the NLRB and the OSHA; the ineffectiveness and underutilization of the Equal Access to Justice Act at both agencies; and the necessity of a different standard that awards fees and costs to certain small entities prevailing against the Board or the OSHA. Also provides that the purpose of H.R. 1987 is to ensure that certain small businesses and small labor organizations will not be de-

[30] 29 CFR Part 102.144(b); 29 CFR Part 2204.106(b).
[31] July 31, 1979, debate on the EAJA, 125 Cong. Rec. at 21444.
[32] Id., at 21439.

terred from seeking review of, or defending against, Board or OSHA actions because of the expense involved; to reduce the disparity in resources and expertise between certain small entities and the NLRB and the OSHA, and to make both agencies more accountable for their enforcement actions.

Section 3

Amends the National Labor Relations Act to require the Board to pay the attorney's fees and costs of parties who have not more than 100 employees and a net worth of not more than $7 million who prevail against the Board in both administrative proceedings or in court proceedings. Also makes clear that such fees and costs shall be awarded to such an entity as a prevailing party under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d) of the Equal Access to Justice Act without regard to whether the position of the Board or the United States was substantially justified or special circumstances make an award unjust.

Section 4

Provides that Section 3 applies to agency proceedings and civil actions commenced on or after the date of the enactment of this Act.

Section 5

Amends the Occupational Safety and Health Act to require the Secretary of Labor to pay the attorney's fees and costs of parties who have not more than 100 employees and a net worth of not more than $7 million who prevail against the OSHA in both administrative proceedings or in court proceedings. Also makes clear that such fees and costs shall be awarded to such an entity as a prevailing party under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d) of the Equal Access to Justice Act without regard to whether the position of the Secretary of Labor or the United States was substantially justified or special circumstances make an award unjust.

Section 6

Provides that Section 5 applies to agency proceedings and civil actions commenced on or after the date of the enactment of this Act.

EXPLANATION OF AMENDMENTS

The Amendment in the Nature of a Substitute is explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill provides for the reimbursement of attorney's fees and expenses to certain prevailing small employers, the legislation is intended to help prevent spurious lawsuits and ensure that employers of modest means have an incentive to adequately represent themselves against the National Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA). The bill does

not prevent legislative branch employees from receiving the benefits of this legislation.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill provides for the reimbursement of attorney's fees and expenses to certain prevailing small employers. As such, the bill does not contain any unfunded mandates.

ROLLCALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 1 **BILL** H.R. 1987 **DATE** July 29, 1999

PASSED 24 - 19

SPONSOR/AMENDMENT Mr. Petri / motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to and that the bill as amended do pass

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GOODLING, Chairman	X			
Mr. PETRI, Vice Chairman	X			
Mrs. ROUKEMA	X			
Mr. BALLENGER	X			
Mr. BARRETT	X			
Mr. BOEHNER	X			
Mr. HOEKSTRA	X			
Mr. McKEON				X
Mr. CASTLE	X			
Mr. JOHNSON	X			
Mr. TALENT	X			
Mr. GREENWOOD	X			
Mr. GRAHAM	X			
Mr. SOUDER	X			
Mr. McINTOSH	X			
Mr. NORWOOD				X
Mr. PAUL	X			
Mr. SCHAFFER	X			
Mr. UPTON	X			
Mr. DEAL	X			
Mr. HILLEARY	X			
Mr. EHLERS	X			
Mr. SALMON				X
Mr. TANCREDO	X			
Mr. FLETCHER	X			
Mr. DEMINT	X			
Mr. ISAKSON	X			
Mr. CLAY		X		
Mr. MILLER		X		
Mr. KILDEE		X		
Mr. MARTINEZ				X
Mr. OWENS		X		
Mr. PAYNE		X		
Mrs. MINK		X		
Mr. ANDREWS		X		
Mr. ROEMER		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. ROMERO-BARCELO				X
Mr. FATTAH				X
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KIND		X		
Ms. SANCHEZ		X		
Mr. FORD		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
TOTALS	24	19		6

CORRESPONDENCE

HOUSE OF REPRESENTATIVES,
Washington, DC, August 3, 1999.

Hon. WILLIAM GOODLING,
Committee on Education and the Workforce,
Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: On roll call vote number one, regarding reporting H.R. 1987 to the House floor, I was unavoidably detained due to legislative duties. Had I been present, I would have voted aye.

I would appreciate this letter being inserted into the Committee's report. Thank you for your attention to this matter.

Sincerely,

HOWARD P. "BUCK" MCKEON,
Member of Congress.

HOUSE OF REPRESENTATIVES,
Washington, DC, September 27, 1999.

Hon. BILL GOODLING,
Chairman, Education and the Workforce Committee,
Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN GOODLING: Due to a conflict in my legislative responsibilities I was unavoidably detained from voting during the Committee on Education and the Workforce's consideration of Roll Call Vote number 1, the motion to report favorably the bill H.R. 1987, the "Fair Access to Indemnity and Reimbursement Act", to the House of Representatives.

Had I been present I would have voted "aye". I would appreciate this letter being included in the Committee Report to accompany this bill. Thank you for your attention to this matter.

Sincerely,

CHARLIE NORWOOD,
Member of Congress.

HOUSE OF REPRESENTATIVES,
Washington, DC, September 21, 1999.

Hon. WILLIAM F. GOODLING,
Chairman, Education and the Workforce Committee,
Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: Due to other legislative responsibilities, I was unable to be present for the House Education and the Workforce Committee vote on H.R. 1987, the Fair Access to Indemnity and Reimbursement Act of 1999. Had I been present I would have voted in the affirmative. Please include this in the full committee report. Thank you.

Sincerely,

MATT SALMON,
Member of Congress.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1987 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 5, 1999.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1987, the Fair Access to Indemnity and Reimbursement Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Christina Hawley Sadoti and Cyndi Dudzinski.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 1987—Fair Access to Indemnity and Reimbursement Act

Summary: H.R. 1987 would increase spending by the National Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA) by allowing small businesses to be awarded attorney's fees and expenses when they prevail against the NLRB or OSHA in administrative or judicial proceedings. By enabling those businesses to be reimbursed regardless of whether the position of the NLRB or OSHA was substantially justified, H.R. 1987 would increase spending by about $4 million in 2000, and $20 million over the 2000–2004 period, subject to annual appropriations.

In addition, enactment of H.R. 1987 could affect fines collected by the federal government from companies that violate employment health and safety laws. Although the reduction in the amount of fines is likely to be insignificant, the bill would be subject to pay-as-you-go procedures.

H.R. 1987 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA)

and would impose no costs on the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 1987 is shown in the following table. The costs of this legislation fall within budget functions 500 (education, training, employment, and social services) and 550 (health).

	By fiscal years, in millions of dollars—					
	1999	2000	2001	2002	2003	2004
SPENDING SUBJECT TO APPROPRIATION						
Spending by the NLRB and OSHA Under Current Law: [1]						
Estimated Authorization Level	528	549	567	586	605	624
Estimated Outlays	527	547	565	583	602	622
Proposed Changes:						
Estimated Authorization Level	0	4	4	4	4	4
Estimated Outlays	0	4	4	4	4	4
Spending by the NLRB and OSHA Under H.R. 1987:						
Estimated Authorization Level	528	553	571	590	609	628
Estimated Outlays	527	551	569	587	606	626

[1] Amounts shown are CBO's baseline projections, assuming adjustments for anticipated inflation. Without such inflation adjustments, the estimates under current law would be $528 million each year, and the estimates of spending under H.R.. 1987 would be $532 million for each year over the 2000–2004 period.

Basis of estimate

Spending subject to appropriation

H.R. 1987 would amend the statutes governing the NLRB and OSHA to change the situations in which these agencies make payments under the Equal Access to Justice Act (EAJA). Currently under the EAJA, a prevailing party with fewer than 500 employees and less than $7 million in net worth may recover fees and expenses, but only if the party can prove that the position of the United States was substantially unjustified. In practice, that is difficult to prove. Between 1982 and 1997, 345 parties involved in NLRB cases filed applications under EAJA. Those claims represent about 4 percent of the NLRB cases which went to adjudication. Of those applications, only 59 of NLRB petitions (about 17 percent of those that had applied) were granted. Over the same period, 82 parties involved in OSHA cases filed applications under EAJA, which represented less than 1 percent of OSHA cases that went to adjudication. Of those applications, 37 percent were granted EAJA reimbursement. A total of $1.6 million in fees and expenses was awarded under EAJA from cases involving the two agencies.

Enacting H.R. 1987 would make it easier for very small businesses to recover fees and expenses by eliminating the requirement that they prove the U.S. government was not substantially justified in bringing its case. The increase in spending by the NLRB and OSHA due to that change would be about $4 million annually. In accordance with provisions of EAJA, the payments of fees and expenses would be made from each agency's discretionary appropriations.

Of the roughly 30,000 unfair labor practice cases brought annually by the NLRB, about half involve firms with fewer than 100 employees, and less than 2 percent of those cases go to adjudication. The NLRB generally prevails in over 80 percent of cases brought before an administrative law judge. Although the NLRB does not keep data on the net worth of the businesses against

which it brings cases, the business information services firm of Dun & Bradstreet estimates that the distribution of net worth is roughly similar to the distribution of the number of employees per company. This estimate assumes that about half of the cases lost by the NLRB—or about 40 per year—involve establishments that meet the size and net worth tests under H.R. 1987. Using the average amount paid by the NLRB under EAJA, CBO estimates that the NLRB would pay an additional $1 million per year.

In regard to OSHA cases under EAJA, the prevailing party is determined on a per citation basis. If a fine or penalty out of the several fines that may be contested in a case is removed or significantly reduced, OSHA reimburses the employer for the attorney's fees attributable to that portion of the case. In almost all of the OSHA cases that have been contested by the employer in adjudication, the judges have reduced the fines to be collected from the employer. Based on data from the Occupational Safety and Health Review Commission through 1998, the amount awarded for attorney's fees under EAJA has varied, but averages around $8,000 per case. In 1998, 350 of the OSHA cases that went to adjudication involved employers with 100 or fewer employees. Based on this information, CBO estimates that, under H.R. 1987, OSHA would pay an additional $3 million per year in attorney's fees.

Pay-as-you-go consideration: The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. Requiring OSHA to pay the attorney's fees for very small businesses that prevail against OSHA in adjudication would increase the incentive for OSHA to reduce its fine or penalty in a settlement and avoid adjudication. This could reduce the amount of the penalties OSHA would have otherwise collected from these employers. Amounts collected from these employers. Amounts collected from fines and penalties are considered revenues and are thus subject to pay-as-you-go procedures. Based on the amount that OSHA has collected after adjudication in the past, CBO estimates the reduction in revenue from enacting H.R. 1987 would be less than $500,000 a year.

Intergovernmental and private-sector impact: H.R. 1987 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Christina Hawley Sadoti and Cyndi Dudzinski. Impact on State, Local, and Tribal Governments: Susan Sieg. Impact on the Private Sector: Ralph Smith.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

STATEMENT OF OVERSIGHT FINDINGS OF THE COMMITTEE ON GOVERNMENT REFORM

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform on the subject of H.R. 1987.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

COMMITTEE ESTIMATE

Clauses 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 1987. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 20 OF THE NATIONAL LABOR RELATIONS ACT

AWARDS OF ATTORNEYS' FEES AND COSTS

SEC. 20. (a) ADMINISTRATIVE PROCEEDINGS.—An employer who, or labor organization that—

(1) is the prevailing party in an adversary adjudication conducted by the Board under this or any other Act; and

(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the adversary adjudication was initiated,

shall be awarded fees and other expenses as a prevailing party under section 504 of title 5, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the Board was substantially justified or special circumstances make an award unjust. For purposes of this subsection, the term "adversary adjudication" has the meaning given that term in section 504(b)(1)(C) of title 5, United States Code.

(b) COURT PROCEEDINGS.—An employer who, or a labor organization that—

(1) is the prevailing party in a civil action, including proceedings for judicial review of agency action by the Board, brought by or against the Board, and

(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the civil action was filed,

shall be awarded fees and other expenses as a prevailing party under section 2412(d) of title 28, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust. Any appeal of a deter-

mination of fees pursuant to subsection (a) or this subsection shall be determined without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust.

SECTION 12A OF THE OCCUPATIONAL SAFETY AND HEALTH ACT

AWARDS OF ATTORNEYS' FEES AND COSTS

SEC. 12A. (a) ADMINISTRATIVE PROCEEDINGS.—An employer who—

(1) is the prevailing party in an adversary adjudication before the Occupational Safety and Health Review Commission under this or any other Act, and

(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the adversary adjudication was initiated,

shall be awarded from the Secretary of Labor fees and other expenses as a prevailing party under section 504 of title 5, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the Secretary of Labor was substantially justified or special circumstances make an award unjust. For purposes of this subsection, the term "adversary adjudication" has the meaning given that term in section 504(b)(1)(C) of title 5, United States Code.

(b) COURT PROCEEDINGS.—An employer who—

(1) is the prevailing party in a civil action, including proceedings for judicial review of an action by the Occupational Safety and Health Review Commission, brought by or against the Secretary or the Commission, and

(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the civil action was filed,

shall be awarded from the Secretary of Labor fees and other expenses as a prevailing party under section 2412(d) of title 28, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust. Any appeal of a determination of fees pursuant to subsection (a) or this subsection shall be determined without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust.

MINORITY VIEWS

H.R. 1987, the "Fair Access to Indemnity and Reimbursement Act," seeks to reverse the American Rule, under which each party to litigation pays its own costs, in a single class of cases, namely, those in which the National Labor Relations Board (NLRB or Board) and the Occupational Safety and Health Administration (OSHA) do not prevail in administrative or judicial proceedings against an employer or labor organization with not more than 100 employees and a net worth of not more than $7 million. Workers have no private right of action under the Occupational Safety and Health Act (OSH Act) or the National Labor Relation Act (NLRA). Consequently, workers rely on OSHA and the NLRB to protect their rights to a safe and healthful workplace and their right to form and join unions for the purpose of exercising a voice in the determination of their wages and working conditions. If the NLRB and OSHA are deterred from bringing cases they are not guaranteed to win, workers' rights and protections would be severely eroded.

The Majority failed to provide any evidence whatsoever that the Board or OSHA have abused their statutory authority in issuing and prosecuting complaints. The Majority has also failed to show that the Equal Access to Justice Act provides insufficient redress to respondents who prevail in proceedings before the NLRB and OSHA Review Commission.

H.R. 1987 is a blatant attempt to chill the Board's and OSHA's exercise of statutory responsibility to enforce the NLRA and the OSH Act, by penalizing these agencies for every instance in which they attempt to do so unsuccessfully. Instead of encouraging cooperation between employers and the two agencies, H.R. 1987 would actually encourage defendants to litigate matters with the NLRB and OSHA, resulting in fewer settlements, lengthier litigation, and ultimately delaying compliance with the NLRA and the OSH Act. Enactment of H.R. 1987 would put the safety and health of thousands of workers at risk and deny workers the right to organize in order to secure higher pay, greater benefits, and job protections.

Proponents of H.R. 1987 do not even attempt to suggest that the costs imposed by H.R. 1987 would be offset by additional appropriations to the NLRB and the Department of Labor. While we are more than a week into fiscal year 2000, the House has yet to pass the FY 2000 Labor, Health and Human Services (HHS), and Education appropriations bill. However, as reported by the Committee on Appropriations, Republicans have proposed to reduce overall OSHA funding from FY 1999 levels by 5% and to cut funding for workplace safety enforcement by 8%. Under the appropriations bill, H.R. 3037, OSHA would be required to eliminate 275 positions, including 175 inspectors, and to furlough all OSHA employees for 21

days. The Republicans have also proposed to reduce the budget of the NLRB by 5% from FY 1999 levels. The Republicans' proposed appropriation for the Board is 17% below the President's request and would impose staff reductions of 134 full-time equivalent positions upon the agency. The prospect of H.R. 3037 being enacted into law are, at best, very remote. It seems likely that additional funding will ultimately be found for the Labor, HHS, and Education appropriations bill and that OSHA and the NLRB will be funded at higher levels than those in H.R. 3037. However, the prospect of allowances being made in the budget of either agency to absorb the costs imposed upon the agencies by H.R. 1987 is non-existent. As a consequence, the additional costs imposed by H.R. 1987 must ultimately come at the expense of agency efforts to deter and remedy violations of the law.

Furthermore, H.R. 1987 will require taxpayers to underwrite the expenses of employer violations. H.R. 1987 requires the NLRB and OSHA to pay employers attorneys fees for any part of a case they do not win. As such, if an employer loses ten claims, but wins one, an employer may claim entitlement to payment as a prevailing party and taxpayers would be responsible for the bill.

DESCRIPTION OF H.R. 1987

H.R. 1987 requires that the NLRB pay the fees and expenses of certain businesses and labor organizations that prevail "in an adversary adjudication conducted by the Board", or "in a[ny] civil action, including proceedings for judicial review of agency action by the Board, brought by or against the Board." This provision would apply to employers or labor organizations with not more than 100 employees and a net worth of not more than $7 million. Likewise, H.R. 1987 requires that OSHA, via the Department of Labor (who would be responsible for paying when judgments are rendered against the Occupational Safety and Health Review Commission), pay the fees and expenses of small businesses and labor organizations that prevail "in an adversary adjudication before the Occupational Safety and Health Review Commission", or "in a[ny] civil action, including proceedings for judicial review of an action by the Occupational Safety and Health Review Commission, brought by or against the Secretary or the Commission." This provision will also apply to employers and labor organizations with not more than 100 employees and a net worth not more than $7 million.

H.R. 1987 IS NOT LIMITED TO SMALL BUSINESSES

H.R. 1987, despite its stated intent to apply to "small businesses and labor organizations," achieves far broader coverage with its enlarged net worth and employee requirements. Bureau of Labor Statistics data for the first quarter of 1998 show that there were over 6.5 million private sector establishments with 99 or fewer employees, employing 55 million workers, 54% of the private sector workforce. These establishments comprise the vast majority of American businesses—about 97%.[1] In contrast, Congress traditionally defines "small business" for the purpose of establishing coverage under a wide range of employment-related laws by imposing a far *smaller*

[1] See U.S. Census Bureau, Statistics of U.S. Businesses, internet:http://www.census.gov.

ceiling on the size of the workforce. The Age Discrimination in Employment Act, for example, applies to employers who have "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[2] Similarly, the Americans with Disabilities Act covers employers with fifteen or more employees, 42 U.S.C. 2111(5), as does title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b). Thus, the Majority's definition of "small business" in H.R. 1987 serves a rhetorical purpose only; in practice, it achieves nearly-universal coverage.

H.R. 1987 IS UNSUPPORTED BY THE EVIDENCE

Moreover, there is no evidence to justify this radical departure from the American Rule, under which each party to litigation bears its own costs. The Majority has come forward with nothing to demonstrate that the NLRB's and OSHA's prosecutorial discretion should be changed in this manner. Indeed, the statistics demonstrate otherwise. According to the Majority's views, out of more than 30,000 allegations of unfair labor practices filed with the NLRB, the NLRB brought only 3,421 complaints. The fact that 9 out of 10 allegations filed with the Board failed to result in the issuance of a complaint, a necessary step for the provisions of H.R. 1987 to be triggered, is hardly evidence that the agency is filing massive numbers of frivolous or non-meritorious cases. In Fiscal Year '98, the overwhelming majority of unfair labor practice cases filed with the NLRB in the agency's field offices were disposed of within a median of 97 days without the necessity of formal litigation: 30.7 percent through dismissal before complaint, 30.6 percent through withdrawals before complaint, and 33.1 percent through settlements and adjustments.[3] Moreover, in FY '98, 144 cases involving the NLRB were decided by the courts of appeals. Of these cases, the Board won 83.4 percent in whole or in part; 5.6 percent of these cases the courts remanded entirely; and 11.0 percent were cases lost in their entirety (compared to 12.0 percent in FY '97).[4] This impressive record as a whole demonstrates the Board's careful selection of meritorious charges in which to proceed with issuance of a complaint, and the skill with which it prosecutes them. In addition, it refutes any notion that the Board has abused its statutory authority to enforce the Act through administrative judicial proceedings.

Furthermore, while the board resolves the vast majority of cases either before issuance of a complaint or initiation of formal proceedings, there is no evidence to suggest that parties are unduly pressured into foregoing action on their charges. Settlements are often achieved by the employer's posting of a notice at the workplace. Indeed, of the 11,910 cases closed in Fiscal year 1998, this remedial action was invoked in 3,402 of them.[5]

OSHA statistics also undermine the contention that OSHA has engaged in a practice of prosecutorial abuse. According to the Majority's views, out of nearly 77,000 total violations cited in fiscal year 1998, only 2,061 inspections resulted in citations that were

[2] 29 U.S.C. 630(b).
[3] NLRB's FY '98 Report at 5.
[4] Id. at 17.
[5] FY '98 Report at 136.

contested. Once again, the facts have condemned the Majority's case. In FY '98, Federal OSHA conducted more than 34,000 inspections, 16,396 of which resulted in citations at workplaces with fewer than 100 employees. Sixty percent of these citations were settled between OSHA and the employer in informal conferences. Employers contested 1,275 or 8% of the citations before the Occupational Safety and Health Review Commission. Moreover, in FY '98 nineteen (19) OSHA enforcement cases were decided by Federal appellate courts. OSHA won a total of 77 percent of these cases (Most of which had originated several years before FY '98).[6] These numbers suggest that OSHA neither issues citations nor enters into litigation against employers in a capricious manner.

In fact, there has been virtually no consideration of H.R. 1987 on the part of this Committee. The only hearing that the Majority claims to have held on H.R. 1987 is a single field hearing held in Indianapolis.[7] However, the major focus of that hearing was on another bill, H.R. 1441. Much of the testimony recited in the Majority views in support of this legislation is, in fact, irrelevant to it. Mr. Krupin and Mr. Norwillo are complaining primarily about costs employers incur in responding to allegations, as opposed to complaints.[8] Mr. Mailman provided unsubstantiated testimony regarding costs he incurred defending himself against allegedly frivolous charges that never resulted in the issuance of a complaint. H.R. 1987 does nothing to alter the duty of the NLRB and OSHA to investigate allegations brought to them and therefore does not address employer costs associated with such investigations. The remedies provided by H.R. 1987 are only triggered once OSHA or the NLRB have brought a complaint. If the Majority believes they have identified a problem, they have failed to address it. If the Majority believes they have identified a solution, they have failed to justify it.

The Majority justifies the bill, in part, on the basis of hearings held in the previous Congress. However, the Majority also describes H.R. 1987 as "an expanded version of Title IV of last Congress' H.R. 3246." The Majority fails to offer any further explanation of the differences between Title IV of H.R. 3246 and H.R. 1987. However, H.R. 1987 is considerably broader than Title IV of H.R. 3246 in that it not only applies to a greater number of employers (H.R. 3246 was limited to employers or unions with not more than 100 employees and a net worth of not more than $1.4 million), but also, for the first time, extends the legislation to cover actions by OSHA. No witnesses in the previous Congress testified as to the appropriateness of extending H.R. 3246 to OSHA, nor did any of the wit-

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[6] See Data From The Office of the Solicitor For Records, U.S. Department of Labor, 1998.

[7] Joint Hearing on "the Practice of Salting and its Impact on Small Business", May 10, 1999, Indianapolis, Indiana.

[8] Specifically, Mr. Norwillo in his May 10, 1999 written statement discusses the costs involved in responding to salting allegations, as opposed to complaints. Mr. Norwillo states, "Salting ULP's and other administrative filings, regardless of how frivolous or patently false, require an employer response. These responses mandate the reallocation of time, money and other productive resources from marketing, advertising, sales, market research, employee training and other legitimate business pursuits. Invariably, employer attorney's fees comprise the largest component of this defense cost. These daunting figures compel employers to settle contested charges on unfavorable terms regardless of culpability. In addition, these financial pressures impose an independent pecuniary penalty on employers who resist the temptation to settle and prevail on the charges, this chilling the resolve of employers to defend against a repeat barrage in the future."

nesses at the Indianapolis hearing address this issue. The Committee has made the determination to require OSHA to pay employer attorney fees in any case in which it does not prevail, regardless of how justified the agency was in bringing the case, without ever soliciting any testimony regarding the appropriateness of such an action. So much for the documented need for this legislation.

Since OSHA either settles or wins the vast majority of enforcement cases, there is no justification for assuming that employers need to be protected against an overzealous prosecutorial agency. Instead of encouraging cooperation between employers and OSHA, H.R. 1987 would actually encourage defendants to litigate. Fewer settlements and lengthier litigation would delay compliance with the OSH Act. This would come at a time when OSHA's commitment to the protection of millions of American workers has had a tremendous impact on reducing occupational injuries, illnesses and death. As such, attempting to alter the agency's prosecutorial discretion could prove to be extremely counterproductive and disastrous to millions of workers.

SMALL EMPLOYERS ARE ALREADY ENTITLED TO RECOVERY OF LEGAL FEES UNDER EAJA

Not only is there a total lack of evidence as to NLRB or OSHA abuses that would warrant this unprecedented shifting of fees in NLRA and OSHA litigation, but there is already a remedy for parties that prevail in litigation involving the Board, namely the Equal Access to Justice Act (EAJA).[9] Further, while the Committee has jurisdiction over the OSHA and the NLRB, it does not have jurisdiction over EAJA. We are unaware of any concerns expressed by the Government Reform or judiciary Committees, the Committees which have responsibility for assessing the law, that EAJA is failing to achieve Congressional intent. Nor has any evidence been presented to this Committee that EAJA works any differently at the NLRB or OSHA than it does at any other agency. In fact, the GAO study cited by the Majority clearly indicates the opposite. The Majority contends that EAJA is underutilized and has been judicially interpreted contrary to congressional intent and therefore has failed. However, the only evidence offered for the assertions are the assertions, themselves.

[9] 5 U.S.C. at 504 (EAJA).

H.R. 1987 would penalize two government agencies, agencies coincidentally charged with protecting workers' rights, every time it loses regardless of how meritorious the action of the agency was. Under EAJA, the government must pay the prevailing party's fees and costs only in those situations in which the government's position was not "substantially justified," or where "special circumstances" would make fee-shifting unjust.[10] Thus, Congress has never seen fit simply to shift the financial burdens of litigation to the government when it does not prevail, without regard to the merits of the government's position. Nor can it conjure up any reason whatsoever to single out proceedings involving the NLRB and OSHA for imposition of such a rule.

Furthermore, there is no data to back the characterization that small businesses have underutilized EAJA with respect to administrative and judicial actions under the NLRA and the OSH Act. In fact, according to a GAO study, the NLRB and the Department of Labor ranked fourth and fifth, respectively, out of 15 Federal agencies, in the number of judicial decisions issued with respect to EAJA applications in FY '94. Specifically, OSHA awarded approximately $192,494 in EAJA fees during fiscal years 1987–1997, in 28 cases. This amounts to an average EAJA award of $6,874, a statistic which hardly demonstrates that employers, small or large, have spent huge sums of money in defense of frivolous suits under the OSH Act.

[10] Id. at 504(a)(1).

IMPLEMENTATION OF H.R. 1987 WILL FURTHER FRUSTRATE THE ABILITY TO PROTECT THE RIGHTS OF WORKERS

There is nothing that is "fair" about what the Republicans call the "FAIR Act." This legislation punishes agencies for bringing actions that are substantially justified but which the agency fails to win in whole. Coincidentally, the agencies that H.R. 1987 chooses to so punish are agencies charged with protecting the rights of workers. H.R. 1987's chilling effect on the willingness of the NLRB and OSHA to bring actions on behalf of workers is obvious. What we find particularly troubling, however, is that neither the NLRA nor the OSH Act afford workers a private right of action. Thwarting the ability of the NLRB or OSHA to bring actions on behalf of workers is, therefore, tantamount to denying workers any recourse in law. We strongly believe that the right to organize for the purpose of exercising a meaningful voice in the determination of one's terms and conditions of employment promotes the general welfare. Unions have raised living standards, helped to close the wage gap for women and minorities, and strengthened communities. We also strongly believe that workers should have an enforceable right to secure a safe and health workplace. H.R. 1987 impedes both objectives. By leaving workers with the legal claim of the right to form and join unions and to have a safe and health workplace, while denying workers a meaningful ability to enforce that claim, H.R. 1987 invites disrespect for the law and for the institutions that make and enforce the law. H.R. 1987 does not simply undermine the rights of working men and women, it does a disservice to fundamental principles of law and justice.

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